Supreme Court of the United States

OCTOBER TERM, 1929

No. 17, ORIGINAL.

STATE OF NEW YORK,

Complainant,

vs.

STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO,

Defendants.

BRIEF FOR COMPLAINANT IN SUPPORT OF COMPLAINANT'S SUBSTITUTE EXCEPTIONS, AND IN OPPOSITION TO DEFENDANT'S EXCEPTIONS TO THE MASTER'S REPORT ON RE-REFERENCE.

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Solicitor for Complainant.

SUBJECT INDEX

PAGE

Preliminary Statement..... 5

Complainant's Exceptions..... 9

Summary of Argument:

1. The program outlined by the Master is not an adequate program of practical measures for the disposition of the sewage in the sanitary district through other means than lake diversion, as interpreted by the Master, and does not comply with the order of this Court dated January 14, 1929 11

A. It is not adequate..... 11

B. The inclusion by the Master of controlling works as a part of his program of practical measures for the disposition of sewage was erroneous, because it preserves rather than prevents diversion, and because it conditions complainant's relief upon the discretion of the Secretary of War. 14

2. Upon the completion of the sewage disposal program no diversion or flow at Lockport is necessary or legally admissible to maintain navigation in the Chicago River as part of the Port of Chicago.. 15

A. Diversion is not necessary in the interests of navigation on the Chicago River as a part of the Great Lakes system..... 16

PAGE

B. Upon the completion of the practical measures recommended by the Master, or of complainant's program, there will be no nuisance in the Chicago River such as to require the diversion of any lake water 17

C. The Congress by general and special legislation has affirmatively determined that the discharge of local sewage and street wash into any of the navigable waters of the United States shall not constitute an obstruction of navigation or navigable capacity as a matter of law..... 19

3. Defendants' exceptions are not well founded 21

A. The time allowed by the Master for the construction and placing in operation of practical measures for sewage disposal was sufficient 21

B. The jurisdiction of this Court to fix the amount of diversion in the interest of navigation has been decided (Wis. v. Ill. 278 U. S. 376) 22

C. The Master was correct in not allowing additional diversion in the alleged interest of navigation in the Illinois River or Michigan Canal 22

D. The Master was correct in finding it to be practicable to determine permissible reductions in diversion during the construction..... 22

PAGE

4. The decree proposed should have awarded costs to the camplainant including the fees of the Special Master 23

5. This Court should amend the findings of fact and conclusions of law and recommendations as submitted by the Special Master in his report on re-reference and issue a decree in the form proposed by complainant in its substitute exceptions 24

TABLE OF CASES

Mononghaela Bridge Co. v. U. S., 216 U. S. 177 20
N. Dakota v. Minnesota, 263 U. S. 583..... 23
New York v. New Jersey, 256 U. S. 296..... 17
Wisconsin v. Illinois, 278 U. S. 367.....6, 9, 22

STATUTES CITED

U. S. Code, Tit. 33, § 407 (Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152)..... 19
U. S. Code, Tit. 33, § 421 (June 23, 1910, c. 359, 36 Stat. 593)..... 20

Supreme Court of the United States

OCTOBER TERM, 1929

No. 12, ORIGINAL

STATE OF NEW YORK,
Complainant,

vs.

STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO,
Defendants.

BRIEF FOR COMPLAINANT IN SUPPORT OF COMPLAINANT'S SUBSTITUTE EXCEPTIONS, AND IN OPPOSITION TO DEFENDANT'S EXCEPTIONS TO THE MASTER'S REPORT ON RE-REFERENCE

PRELIMINARY STATEMENT

This original action No. 12 was commenced in October, 1926. Subsequently, upon the petition of complainant, the Supreme Court permitted complainant to participate in the trial of the related suit No. 7 original, entitled "State of Wisconsin, State of Minnesota, State of Ohio, State of Pennsylvania, against The State of Illinois and the Sanitary District of Chicago" in "like manner as if those suits had been consolidated." Complainant herein thereupon did participate in the proceedings before the Hon. Charles E. Hughes, as Special Master. On November 23, 1927, the

Special Master filed his report on original reference and on January 14, 1929 the Supreme Court handed down its opinion and order herein. (*The State of Wisconsin* v. *The State of Illinois*, 278 U. S. 367). That opinion reviewed in detail the history of the diversion by the defendants of large quantities of water from the Great Lakes into the Mississippi watershed for the purpose of sewage disposal to the damage of the complainants.

The order referred the case againt to the Master for a further examination into the questions indicated in the opinion. The parts of the opinion deemed to indicate the questions are those appearing on pages 418 to 421 as follows:

> "It will be perceived that the interference which was the basis of the Secretary's permit, and which the latter was intended to eliminate, resulted directly from the failure of the Sanitary District to take care of its sewage in some way other than by promoting or continuing the existing diversion. It may be that some flow from the Lake is necessary to keep up navigation in the Chicago River, which really is part of the Port of Chicago, but that amount is negligible as compared with 8,500 second feet now being diverted. Hence, beyond that negligible quantity, the validity of the Secretary's permit derives its support entirely from a situation produced by the Sanitary District in violation of the complainant's rights; and but for that support complainants might properly press for an immediate shutting down by injunction of the diversion, save any small part needed to maintain navigation in the river. In these circumstances we think they are entitled to a

decree which will be effective in bringing that violation and the unwarranted part of the diversion to an end. But in keeping with the principles on which courts of equity condition their relief, and by way of avoiding any unnecessary hazard to the health of the people of that section, our decree should be so framed as to accord to the Sanitary District a reasonably practicable time within which to provide some other means of disposing of the sewage, reducing the diversion as the artificial disposition of the sewage increases from time to time, until it is entirely disposed of thereby, when there shall be a final, permanent operative and effective injunction. * * *

In increasing the diversion from 4,167 cubic feet a second to 8,500, the Sanitary District defied the authority of the National Government resting in the Secretary of War. And in so far as the prior diversion was not for the purposes of maintaining navigation in the Chicago River it was without any legal basis, because made for an inadmissible purpose. It therefore is the duty of this Court by an appropriate decree to compel the reduction of the diversion to a point where it rests on a legal basis and thus to restore the navigable capacity of Lake Michigan to its proper level. The Sanitary District authorities, relying on the argument with reference to the health of its people, have much too long delayed the needed substitution of suitable sewage plants as a means of avoiding the diversion in the future. Therefore, they can not now complain if an immediately heavy

burden is placed upon the District because of their attitude and course. The situation requires the District to devise proper methods for providing sufficient money and to construct and put in operation with all reasonable expedition adequate plants for the disposition of the sewage through other means than the Lake diversion.

Though the restoration of just rights to the complainants will be gradual instead of immediate it must be continuous and as speedy as practicable, and must include everything that is essential to an effective project. * * *

To determine the practical measures needed to effect the object just stated and the period required for their completion there will be need for the examination of experts; and the appropriate provisions of the necessary decree will require careful consideration. For this reason, the case will be again referred to the Master for a further examination into the questions indicated."

The questions thus indicated are deemed to be these:

(1) What are the practical measures necessary for the disposition of the sewage of the Sanitary District of Chicago through other means than the lake diversion;

(2) Within what time can these practical measures be completed and put into operation;

(3) What reductions in the diversion will be practicable immediately, and from time to time, pending the completion and placing in operation of said practical measures;

(4) What flow or diversion, if any, from Lake Michigan is necessary to maintain navigation in the Chicago River, as a part of the Port of Chicago, after such practical measures have been completed and placed in full operation.

After hearings on re-reference, the Master made and filed his report answering the foregoing questions on December 17, 1929.

Joint exceptions to this report were filed by the complainant in Original Action No. 7 (*Wisconsin et al.* v. *Illinois et al.*), Original Action No. 11 (*Michigan* v. *Illinois et al.*), and Original Action Action No. 12 (*New York* v. *Illinois et al.*). But, upon permission duly granted, Substitute Exceptions have been duly filed by this complainant in the last named action.

COMPLAINANT'S EXCEPTIONS

Complainant's Substitute Exceptions do not object to the Master's answer to the second and third questions, but object to his answers to the first and fourth questions, to his failure to recommend costs, and to his refusal to find certain proposed findings of fact and conclusions of law.

In answer to the first question the Master should have found what practical measures were necessary to dispose of the sewage by means other than diversion of lake water. At pages 34 and 35 of his report he sets out his answer but describes the measures which he there recommends as those which will afford practical measures from the standpoint of present sanitary engineering knowledge for complete treatment of the dry weather flow of sewage and waste, and in times of storm, of approximately 150 per cent of the ordinary dry weather flow.

Complainant has excepted to that finding, deeming it unresponsive, having in mind the relief which the Master deemed could be predicated upon it as expressed in his answer to the fourth question.

The fourth question required a finding of what diversion, if any, would be necessary to maintain navigation in the Chicago River as a part of the Port of Chicago after the said practical measures were completed and in full operation. The answer of the Master on this question (M. R. 138) finds necessary a diversion of 1500 c. f. s., in addition to pumpage, to carry away from the Chicago River the effluent which he had provided in his answer to Question 1 should be allowed to flow into that river. Complainant deems this not responsive to the order of the Court which directed the provision of means of sewage disposal without diversion.

Complainant's exceptions ancillary to its Exceptions I and II, and complainant's Exceptions V, VII and VIII are exceptions to the Master's failure or refusal to grant findings of fact requested by it that there were additional means to make diversion unnecessary, such as the chlorination of the effluent from the sewage disposal plants; the flushing of the Chicago River by pumping circulating water into it so that it would flow in its original direction; and the construction of outfall sewers or tunnels to carry the effluent entirely away from the Chicago River and its branches. Other possible additional means are the construction of a separate sanitary sewer system to take care of the storm water run-off, and additional preliminary treatment of storm water overflow.

ARGUMENT

POINT I

The program outlined by the master is not an adequate program of practical measures for the disposition of the sewage in the sanitary district through other means than lake diversion, as interpreted by the Master, and does not comply with the order of this Court dated January 14, 1929.

A

It is not adequate.

This Court intended to require "the sanitary district to take care of its sewage in some other way than by promoting or continuing the existing diversion"; that the sewage of the district should be "entirely disposed of thereby"; and that the method so adopted "must include everything that is essential to an effective project" (278 U. S. 367, 418, 419, 421).

The Master deemed his program one that would provide for the artificial treatment of sewage so as to purify to the extent of 85 per cent to 95 per cent. He was troubled with the question of the final disposition of the effluent.

Complainant's witnesses believe the effluent from the sewage disposal plants provided for in the Master's program to be one not harmful to navigation or to public health. The testimony to the contrary is insignificant. The Master could have provided for additional artificial treatment of the sewage; or for additional means for its disposal within the watershed instead of by diversion; or he might have deemed the treatment by the means specified by him on pages 34 and 35 to

be adequate and no diversion from the lake to be necessary to dilute or carry it away.

Complainant considers the Master's program suitable, and additional practical measures to be in the nature of improvements not essential to accomplish the purpose stated by the Court, but described these additional practical measures in detail to show their availability. If their adoption is necessary to the restoration of complainant's rights, they should be adopted. If they are essential to the restoration of the claimant's rights, the order of the Court requires their inclusion.

Among the practical measures which are available to safeguard conditions of navigation and public health in the Chicago River and one or all of which should be adopted rather than the continuation of the infringement upon the rights of the complainant by diversion are the following:

> Chlorination of the effluent of the sewage disposal plants (Substitute Exception V);
>
> Flushing the Chicago river by pumping circulating water through it in its original direction (Substitute Exception VII);
>
> The construction of outfall sewers or tunnels to carry the effluent away from the Chicago River (Substitute Exception VIII);
>
> Additional preliminary treatment of storm water overflow;
>
> Construction of a separate sanitary sewer system.

Chlorination of the effluents of the sewage disposal plants would remove 99 to 100% of the bacteria and would be entirely practicable (J. A. 239, 627; M. R. 28).

The installation and operation of pumps to circulate water so that the Chicago River would flow in its original direction is entirely practicable (J. A. 109, 110, 210, 216).

The construction of outfall sewers or tunnels to carry the effluent away from the Chicago River would be practicable according to complainant's witnesses Gascoigne and Howson (J. A. 210, 109) and this was not denied by any witness for the defendants.

The Master's program calls for the treatment of only 150% of the dry weather flow at times of storm water runoff. Although this is probably adequate the existing sewer system of Chicago could be so operated that a greater amount of the initial storm water flow could be carried by the intercepting sewers to the sewage disposal plants rather than by-passed through the outlets provided for excess storm water which lead directly into the Chicago River. The capacity of the existing sewers is such that this preliminary treatment could be given to from 267% to 400% of the storm water runoff rather than to the 150% called for by the Master's program.

If it is deemed that the existing system of sewers is inadequate to carry both the storm water runoff and the content of the sanitary sewer system, a separate system of sanitary sewers could be constructed so that both types of sewage could be given adequate and complete treatment. Such an additional system would of course not be inexpensive, but the estimate of its cost as fixed by defendants' witness Matthews (M. R. 24) was grossly excessive. His figures as to the mileage of sewers required called for the installation of sewers in large areas which are devoted to lakes

or parks and consequently do not need any sanitary sewers. The cross examination showed his estimate to be in other respects entirely haphazard.

B

The inclusion by the Master of controlling works as a part of his program of practical measures for the disposition of sewage was erroneous because it preserves rather than prevents diversion and because it conditions complainant's relief upon the discretion of the Secretary of War.

The Master's program calls for the construction (subject to securing the approval of the Secretary of War therefor) of controlling works at or near the mouth of the Chicago River. The purpose is to prevent storm water from causing that River to flow into Lake Michigan as it was wont to flow.

Until the completion and full operation of this sewage disposal system provided for by the Master, or by complainant's program, this would protect the lake from contamination by untreated sewage from the river. But after the completion of the disposal system the effluent and the content of the river will be innocuous and not offensive.

Controlling works cannot be built without the consent of the Secretary of War. Their inclusion by the Master in his program and proposed decree subjects the restoration of complainant's rights to the discretion of an administrative officer. They are not essential to the program and should be stricken therefrom.

POINT II

Upon the completion of the sewage disposal program no diversion or flow at Lockport is necessary or legally admissible to maintain navigation in the Chicago River as part of the Port of Chicago.

In answering the fourth question the Special Master found that a minimum diversion of 1500 c.f.s. (in addition to pumpage) was necessary to maintain navigation in the Chicago River as a part of the Port of Chicago. His answer to the first question had provided that the effluent from the sewage disposal plants should go into the Chicago River. Its presence there he considered would cause such a condition in regard to navigation and public health as to require the above diversion from the Great Lakes watershed to the Mississippi watershed.

In its opinion of January 14, 1929, this court found that Congress had not authorized any diversion for the purpose of navigation on the Illinois or Mississippi rivers and held that such diversion was not allowable for the purpose of this case (278 U. S. 367 at 417). Congress has not taken any subsequent action (M. R. 122). It is perfectly clear from the Court's opinion that any diversion to be permitted in the interests of navigation was to be in the interests of navigation in the Chicago River as a part of the Great Lakes-St. Lawrence system, and not as a part of the Mississippi-Illinois river system. Nor was it to be in the interests of sanitation. At 418, the Chief Justice said:

> "He (the Secretary of War) could not make mere local sanitation a basis for a continuing diversion."

A

Diversion is not necessary in the interests of navigation on the Chicago River as a part of the Great Lakes system.

At page 126 of his report, the Master says:

> "So far as depths are concerned, it appears that no diversion of the water from Lake Michigan is required for purposes of navigation in the Chicago River, and there is testimony that without a flow at Lockport there would be an improvement with respect to the current in the river."

All of the witnesses in this case save the witnesses Eddy and Jadwin testified that upon the completion and operation of the proposed program no flow at Lockport would be necessary to maintain navigation; that this elimination of the current would improve navigation; that depths and widths would be improved; that deposits from street wash would be negligible and removed in the regular course of maintenance; that the purified effluent would have no adverse effect upon navigation.

Such testimony was given by Colonel Townsend who has had forty-five years experience in the Army Engineering Corps on River and Harbor work (J. A. 244-258); by General Keller who has had thirty-five years experience in the same service (J. A. 401, 405); by Major Putnam who had been United States District Engineer at Chicago (J. A. 99); and by Captain Inches, a captain who has sailed the Great Lakes and the Chicago River for about thirty years (J. A. 239-241).

And General Jadwin testified that the cessation of flow at Lockport would improve navigable con-

ditions so far as width, depth and current are concerned. The need of diversion he found to be in the alleged nuisance (J. A. 9, 10, 16, 19, 31).

B

Upon the completion of the practical measures recommended by the Master, or of complainant's program, there will be no nuisance in the Chicago River such as to require the diversion of any lake water.

The Master has found that the completion and operation of his proposed sewage disposal system will result in a pollution of the Chicago River such as to constitute a nuisance and to require the diversion of water from the lake to dilute it and carry it off, in the interests of navigation.

The Master finds "that pollution caused by the introduction of sewage has relation to the interests of navigation, citing *New York* v. *New Jersey*, 256 U. S. 296, at 397, 398.

But in *New York* v. *New Jersey*, 256 U. S. 296, the discharge of sewage into New York Harbor with only simple preliminary treatment for the removal of gross material was held to be not harmful to navigation.

If the Chicago River is polluted after the completion and operation of his proposed program, it is because his proposed program is inadequate and does not meet the requirements of the order of this Court. But complainant believes that the resulting condition of the Chicago River would not be of such pollution as to affect adversely either navigation or public health.

It was testified that the resulting conditions in the Chicago River would be satisfactory from the point of view of public health; that there would be no odor due to putrefaction of organic matter (Howson, J. A., 108, 109; Gascoigne, J. A., 209;

Townsend, J. A., 215, 216); nor would there be any visible suspended particles recognizable as of sewage origin; nor any oil or floating material upon the surface; nor would the waters be offensive or injurious to the health of passengers or employees on boats or docks; nor would the condition be such as to produce an excessive growth of water plants (id.).

To the same effect was the testimony of the witnesses Waring (J. A. 239, 613) and Rockwood (J. A. 591).

Defendants' witness Pearse affirmed the correctness of previous testimony by him to the effect that effluent from a sewage treatment plant such as provided for "would create no nuisance, and can be turned into a water course, even though dry, without fear of consequences" and that fish could live in it (J. A. 520, 521).

The testimony of the witnesses Eddy and Jadwin were the sole support of the Master's finding to the contrary. The witness Eddy's testimony as to the offensive nature of the effluent (quoted M. R. 129, 130) is in direct conflict with the testimony of the same witness to the Board of Estimates of the City of Milwaukee on November 12, 1919, which is set out in the Master's report on page 30.

The testimony of General Jadwin, Chief of Engineers, is material on the question of navigation but not on the question of sanitation or public health. He testified that the cessation of flow at Lockport would result in greater available depth for navigation in the Chicago River and that the question of diversion "is really a nuisance question". "I am not an expert in the field of nuisances, in the sanitary sense, —" (J. A.

9, 10, 31), and further, that "I think it is correct that as to the quantity of dilution water from the lake, if any, which is necessary when complete treatment plants are in operation, in order to prevent any active nuisance, I am not an expert and am not able to advise" (J. A. 17), and he stated that he was not a sanitary expert or a sanitary engineer (J. A. 15, 38, 39). He further says that "assuming that the effluent from an activated sludge plant is clear, odorless and contains no suspended matter, and also stays odorless indefinitely, I do not see that it would be an objection to navigation." (J. A. 42). And he admits that sewage passes largely untreated into all of the other harbors of the Great Lakes (J. A. 26).

C

The Congress by general and special legislation has affirmatively determined that the discharge of local sewage and street wash into any of the navigable waters of the United States shall not constitute an obstruction of navigation or navigable capacity as a matter of law.

Title 33, U. S. C., Section 407, reads in part:

> § 407. Deposit of refuse in navigable waters generally. It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever *other than that flowing from streets and sewers and passing therefrom in a liquid state,* into *any* navigable water of the United States, or into *any* tributary of any navigable water from which the same shall float or be washed into such navigable water;" * * *

and Section 421 of Title 33, relating specifically to the vicinity of Chicago, reads in part as follows:

> "§ 421. Deposit of refuse, etc., in Lake Michigan near Chicago. It shall not be lawful to throw, discharge, dump, or deposit, or cause, suffer, or procure, to be thrown, discharged, dumped, or deposited, any refuse matter of any kind or description whatever *other than that flowing from streets and sewers and passing therefrom in a liquid state into Lake Michigan*, at any point opposite or in front of the county of Cook, in the State of Illinois, or the county of Lake in the State of Indiana, within eight miles from the shore of said lake." * * *

This determination by Congress that the discharge of local sewage and street wash into any of the navigable waters of the United States shall not constitute an obstruction of navigation or navigable capacity as a matter of law, is conclusive.

Monongahela Bridge Co. v. *United States*, 216 U. S. 177 at 195.

POINT III

The defendant's exceptions are not well taken.

A

The time allowed by the Master for the construction and placing in operation of practical measures for sewage disposal was sufficient.

Defendants' exceptions numbers three and four complain that the Special Master did not give due consideration to the fact that the level of the lakes has risen an appreciable amount since the date of his original report. Defendants claim that by reason of this elevation of lake levels complainant would not be injured by the granting of a longer period for the construction of their sewage disposal works. However, since the elevation of the lakes varies it might well be that the period beyond 1938 would be a period of very low lake levels which would cause great damage to complainant, and the diverson during that period would be very harmful. Further, this court allowed defendants a reasonable time to complete suitable sewage disposal plants to avoid unnecessary hazard to the people in the vicinity of Chicago, and not because it deemed that the injury to complainant could be disregarded.

Defendants' exception six complains that the Special Master failed to allow a time for acquiring sites for plants, but it seems that all the sites except one have already been secured (Master's report pp. 45–48; 50); and further complains that the Master did not allow the time necessary to raise funds, but it appears that the Master allowed an additional year for this purpose (Master's report p. 80).

B

The jurisdiction of this Court to fix the amount of diversion in the interest of Navigation has been decided (*Wisconsin v. Illinois*, 278 U. S. 376).

Defendants' exception seven alleges error on the Master's part for its failure to conclude that for this court to fix the amount of diversion would be unconstitutional as an infringement upon the legislative and administrative branches of the government. Since this question was disposed of by the opinion of the court herein of January 14, 1929, discussion is deemed unnecessary.

C

The Master was correct in not allowing additional diversion in the alleged interest of navigation in the Illinois River or Michigan Canal.

Defendants' exceptions ten and eleven complain that the Master failed to permit sufficient diversion to maintain the waters of the Illinois River and the Michigan Canal in a condition reasonably acceptable for navigation. But this court has held that complainants are entitled to a "shutting down by injunction of the diversion, save any small part needed to maintain nevigation in the (Chicago) river" (*Wisconsin* v. *Illinois*, 278 U. S. 367 at 418), and that Congress had never undertaken to authorize any diversion for purposes sought by defendants.

D

The Master was correct in finding it to be practicable to determine permissible reductions in diversion during the construction.

Defendants' exception number thirteen claiming that it is impracticable to determine the permissible reductions in the diversion during the construction period is not sustained by the testimony. Witnesses for both parties support the Master's finding in this regard (Master's report, pp. 96–105).

POINT IV

The decree proposed should have awarded costs to the complainant including the fees of the Special Master.

The original report and the decision of this court have found that the complainant and its citizens were substantially damaged; that these damages were inflicted upon their navigation, commercial interests, structures, summer resorts, fish and game preserves, and other interests. Furthermore, this litigation has been long and expensive. Complainant is entitled to costs under such circumstances.

North Dakota v. *Minnesota*, 263 U. S. 583.

POINT V

Wherefore this Court should amend the findings of fact and conclusions of law and recommendations as submitted by the Special Master in his report on re-reference and issue a decree in the form proposed by complainant in its substitute exceptions.

Respectfully submitted,

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Solicitor for Complainant.